REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL 104 OF 2004

DENNIS NZIVO NGUMI ……..…… APPELLANT

VERSUS

REPUBLIC …… RESPONDENT

(Being an appeal from the judgment of the Chief Magistrate Mr J.R. Karanja delivered on 15/06/2004 in Machakos Criminal Case No. 3168 of 2003)

JUDGMENT

1. The Appellant, Dennis Nzivo Ngumi was arrested on 9/9/2003 and on 23/9/2003 was charged before the Machakos Chief Magistrate's Court with the offence of robbery with violence contrary to section 296 (2) of the Penal Code. It was alleged that::-

"**on the 9th day of September 2003 at Kiandani sub-location in Machakos District within the Eastern Province jointly with others not before court robbed Benard Mutinda Mumo of cash Kshs. 5,000/= and at or immediately before or after the time of such robbery used personal violence to the said Benard Mutinda Mumo."**

2. On 15/6/2004, the Appellant was convicted of the lesser offence of robbery contrary to section 296 (1) of the Penal Code and was sentenced to serve 10 years imprisonment and thereafter to be under police supervision for 5 years. He was dissatisfied and preferred this Appeal against both conviction and sentence. One of the grounds i.e. ground 12 thereof was that his constitutional right under section 77 (2) (b) and (f) was violated in that the language used in taking the plea and throughout the trial was not clearly indicated. Mr O'Mirera, learned state counsel did not address that issue but we deem it our duty to address that issue in limine because if we accept the Appellant's submission on the point then we see no reason to go to other grounds of appeal.

3. We note that on 23/9/2003, the Appellant appeared in court to take his plea. The record reads as follows:-

"**23/9/2003**

Coram: J.R. Karanja CM

Prosecutor: C.I. Kipsang

Court Clerk: Mutisya

Interpretation

Accused: present

The substance of the charge (s) and every element thereof has been stated to the accused person in the language that he/she understands, who being asked whether he/she admits or denies the truth of the charge(s) replies:

I deny offence.

Court: Plea of not guilty.

Hearing on 31/10/03 Court No. 1. Mention on 7/10/2003."

4. Subsequently in proceedings, PW1 testified in Kiswahili, PW2 in an unclear language (the original record is illegible while the typed copy of it has no record of language used, PW3 testified in English, PW4 in Kiswahili and again it is unclear in what language the Appellant tendered his defence. It is also clear from the record of proceedings that there is no record of interpretation made.

5. Section 77 (2) (b) of the Constitution provides as follows:-

"**shall be informed as soon as reasonably practicable, in a language that he understands in detail, of the nature of the offence with which he is charged;"**

6. Additionally in **Adan vs Republic (1973) E.A. 445** the legal principles to be applied in taking plea in all criminal cases were spelt out. It was stated inter-alia in that case as follows:-

"**When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence for which he is charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change of plea to "not guilty" and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused's reply must, of course, be recorded."**

7. In the instant case, it is quite clear that the language used in taking the plea is not indicated and the interpretative language in proceedings is similarly unclear. The Appellant has a point when he says that his rights under Section 77 (2) (b) above may have been violated and we agree with him. We find that the plea was not properly taken and as stated by the Court of Appeal in **Paul Matungu vs R, Cr. Appeal No. 127 of 2006,** in such a situation, "**we do quash the conviction that was entered by the subordinate court and set aside… the sentence."**

8. Having done so, we now need to consider whether a retrial is necessary. Neither the Appellant nor Mr O'Mirera addressed us on this point but we are alive to the principles applicable when an order of retrial is being issued. We note that the Appellant was originally charged with the offence of robbery with violence contrary to section 296 (2) of the Penal Code but was convicted of the offence of robbery contrary to section 296 (1) of the Penal Code. The reason for this act was not recorded by the learned trial magistrate but we would not agree with him for reasons that there was evidence that the Appellant although armed only with a toy pistol which may not necessarily be properly defined as a dangerous weapon was nevertheless in the company of another person during the robbery. Section 296 (2) of the

Penal code reads as follows:-

" **If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."**

9. The evidence in support of the charge was consistent and clear and we see that the prosecution will have no chance to fill up any gaps in evidence. However, we are aware that the Appellant has been in custody since 2003 and has served nearly half of his sentence. To subject him to a retrial in the circumstances of this case would be prejudicial to him. We are also not certain that witnesses would be procured in time more so because PW4 who was the star witness in the case had considerable difficulties attending court during the trial.

10.On the whole therefore, we must allow the Appeal, quash the Appellant's conviction and set aside the sentence meted out to him. He will be released unless he is otherwise lawfully held.

11.Orders accordingly.

Dated and delivered at Machakos this 15th day of April 2008.

J.B OJWANG' **ISAAC LENAOLA**

JUDGE **JUDGE**